C v A

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S2–33–861 OF 1997
KAMALANATHAN RATNAM J
3 JUNE 1998

Family Law *— Marriage — Dissolution of marriage — Parties living apart for 20 years — No reference to conciliatory body — Whether petition for dissolution of marriage should be struck out — Whether there were exceptional circumstances — Whether attempts by relatives to reconcile parties ought to be accepted — Law Reform (Marriage and Divorce) Act 1976 ss 55 & 106 — Rules of the High Court 1980 O 92 r 4*

Words and Phrases *— 'Impracticable' — Law Reform (Marriage and Divorce) Act 1976 s 106(1)(vi)*

The petitioner and the respondent had lived apart for more than 20 years. The petitioner prayed for a dissolution of the marriage. It was stated in his petition that attempts at reconciliation were made by his relatives without success. The respondent raised a preliminary objection that there was non-compliance with s 106 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') because reconciliation was unsuccessfully attempted by the petitioner's relatives and not a conciliatory body as defined by s 106(3) of the Act. The petitioner submitted that since both parties had lived apart for over 20 years, this itself was clearly an exceptional circumstance within the meaning of proviso (vi) to s 106(1).

Held, dismissing the preliminary objection:

(1) Pursuant to s 106(1) of the Act, obtaining a certificate from the conciliatory body that it has failed to reconcile the parties is a pre-requisite, subject to the provisos. Proviso (vi) suggests that the court must be satisfied of the existence of the exceptional circumstances which make reference to a conciliatory body impracticable. The very fact that both parties had lived apart with no contact with one another for well over 20 years is prima facie evidence that each of them is entitled to a dissolution of the marriage. Further, there were no infant children involved to motivate a desire for the continuance of the marriage. A consideration of all these factors clearly show exceptional circumstances, falling within proviso (vi) to s 106 of the Act (see pp 228D, 229I and 230A, C).

(2) The word impracticable in the proviso means impractical. Impractical would present a meaning connoting fruitlessness, a sense of futility and performing an act in vain or where it is not practical or workable to perform such an act. This is just precisely what the petitioner would be doing in this case if he were to refer to the conciliatory body. Such a referral would be an exercise in futility performed solely for the purpose of obtaining a rubber stamp to a certificate showing the failure of the body to effect a reconciliation (see p 230G).

(3) Pursuant to s 55 of the Act, recourse can be made to the rules of the court for a petitioner, before presenting a petition, to rely on such rules to show that the petitioner has sought the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation. Pursuant to proviso (vi) to s 106(1) of the Act, it was open to the petitioner to 'satisfy the Court' that the rules allow him to rely on the fact that he had sought the assistance and advice of persons, namely his relatives. This is a truly appropriate case to invoke the applicability of O 92 r 4 of the Rules of the High Court 1980. To prevent injustice, it is appropriate for this court to hold that attempts by relatives to reconcile the parties ought to be accepted and read together with s 55 and proviso (vi) to s 106(1) of the Act (see p 229D, E–G).

Obiter:

If a petition is filed and it becomes necessary for the petitioner to comply with proviso (vi) to s 106(1), so long as a preliminary objection is taken by the respondent, it is sufficient for the petitioner to either give oral or affidavit evidence to satisfy the court that there are exceptional circumstances (see p 228F).

[Bahasa Malaysia summary

Pempetisyen dan penentang telah tinggal berasingan sejak lebih daripada 20 tahun. Pempetisyen memohon pembubaran perkahwinan. Dalam petisyennya dikatakan bahawa percubaan untuk perdamaian telah dibuat oleh saudara maranya tapi tidak berjaya. Penentang menimbulkan bantahan permulaan bahawa terdapat ketidakpatuhan kepada s 106 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') kerana percubaan untuk perdamaian telah dilakukan tanpa kejayaan oleh saudara mara pempetisyen dan bukannya oleh badan pendamai seperti yang didefinisikan oleh s 106(3) Akta tersebut. Pempetisyen berhujah bahawa oleh kerana pihak-pihak telah tinggal berasingan selama lebih daripada 20 tahun, ini adalah dengan sendirinya secara jelas merupakan keadaan luar biasa dalam ertikata proviso (vi) kepada s 106(1).

Diputuskan, menolak bantahan permulaan:

(1) Mengikut s 106(1) Akta tersebut, memperolehi sijil daripada badan pendamai bahawa ia telah gagal untuk mendamaikan pihak-pihak adalah satu prasyarat, tertakluk kepada proviso-proviso. Proviso (vi) mencadangkan bahawa mahkamah mesti berpuas hati tentang kewujudan keadaan-keadaan luar biasa yang membuatkan rujukan kepada badan pendamai tidak praktikal. Hakikat bahawa kedua-dua pihak telah tinggal berasingan dengan tiada perhubungan antara satu sama lain selama lebih daripada 20 tahun adalah bukti prima facie bahawa setiap dari mereka adalah berhak kepada pembubaran perkahwinan. Selanjutnya,

tidak ada kanak-kanak terlibat untuk mendorong kepada penerusan perkahwinan. Pertimbangan kesemua faktor ini dengan jelasnya menunjukkan keadaan-keadaan luar biasa, yang termasuk dalam proviso (vi) kepada s 106(1) Akta tersebut (lihat ms 228D, 229I dan 230A, C). A

(2) Perkataan 'impracticable' dalam proviso itu bermakna tidak praktikal. Tidak praktikal bermakna tiada hasil, satu keadaan yang sia-sia dan membuat satu tindakan yang sia-sia atau di mana adalah tidak praktikal atau tidak dapat dilakukan untuk mengambil tindakan itu. Ini adalah dengan tepatnya apa yang pempetisyen akan buat dalam kes ini jika beliau merujuk kepada badan pendamai. Rujukan yang sedemikian merupakan tindakan yang sia-sia yang dilakukan semata-mata untuk tujuan mendapatkan sijil yang menunjukkan kegagalan badan itu untuk menghasilkan perdamaian (lihat ms 230G). B C

(3) Mengikut s 55 Akta tersebut, kaedah-kaedah mahkamah boleh digunakan oleh pempetisyen, sebelum mengemukakan petisyen, untuk bergantung kepada kaedah-kaedah sedemikian untuk menunjukkan bahawa pempetisyen telah meminta pertolongan dan nasihat seseorang atau badan yang diadakan untuk menghasilkan perdamaian. Mengikut proviso (vi) kepada s 106(1) Akta tersebut, adalah terbuka kepada pempetisyen 'untuk memuaskan hati mahkamah' bahawa kaedah-kaedah itu membenarkannya untuk bergantung kepada hakikat bahawa beliau telah meminta pertolongan dan nasihat dari orang lain, iaitu saudara maranya. Ini adalah kes yang betul-betul sesuai untuk menggunakan A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980. Untuk mengelakkan ketidakadilan, adalah sesuai bagi mahkamah ini untuk memutuskan bahawa percubaan oleh saudara mara untuk mendamaikan pihak-pihak patut diterima dan dibaca bersama dengan s 55 dan proviso (vi) kepada s 106(1) Akta tersebut (lihat ms 229D, E–G). D E F G

Obiter:

Jika petisyen difailkan dan menjadi perlu kepada pempetisyen untuk mematuhi proviso (vi) kepada s 106(1), selagi bantahan permulaan diambil oleh penentang, adalah mencukupi bagi pempetisyen untuk sama ada memberikan keterangan lisan atau melalui afidavit untuk memuaskan hati mahkamah bahawa terdapat keadaan-keadaan luar biasa (lihat ms 228F). H

Notes

For a case on dissolution of marriage, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 2102. I

Case referred to

Bowman v Bowman [1949] 2 All ER 127 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 55, 106
Rules of the High Court 1980 O 92 r 4

Theresa George (*Thakurdas Jethwani & Co*) for the petitioner.
Evelyn Khoo (*Azman Davidson & Co*) for the respondent.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

On 17 April 1969, the petitioner married the respondent. They lived and co-habited together in Kuala Lumpur and have two children now aged 29 and 25. Sometime in 1975 the petitioner left the matrimonial home and set up his own home in Sentul, Kuala Lumpur, due to misunderstanding. However, the respondent resumed co-habitation at Sentul during the early part of 1976 and left the petitioner's home at the later part of 1976. Since then neither party has had anything to do with the other and they have lived apart for more than 20 years. The petitioner stated in his petition that attempts at reconciliation were made by the petitioner's relatives, without success. The petitioner prayed for a dissolution of the marriage and was prepared to pay the costs.

Preliminary objection

Before filing an answer to the petition, the respondent raised a preliminary objection which was that there was non-compliance with s 106 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The said section reads:

> Requirement of reference to conciliatory body before petition for divorce
>
> (1) No person shall petition for divorce, except under sections 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:
>
> Provided that this requirement shall not apply in any case —
>
> (i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse;
>
> (ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;
>
> (iii) where the respondent has been required to appear before a conciliatory body and has wilfully failed to attend;
>
> (iv) where the respondent is imprisoned for a term of five years or more;
>
> (v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or

(vi) where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable. A

(2) A matrimonial difficulty may be referred to any conciliatory body acceptable to both parties but, where they are unable to agree on a conciliatory body, shall be referred to the marriage tribunal for the area in which they reside or, where they are living in different areas, to the marriage tribunal for the area in which they had last resided together. B

(3) A 'conciliatory body' means —

(a) a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan or association; or

(b) a marriage tribunal; or

(c) any other body approved as such by the Minister by notice in the *Gazette.* C

(4) A marriage tribunal shall be set up for such specified area or district as the Minister may decide, consisting of a Chairman and not less than two nor more than four other members who shall be nominated by the Minister, or by such officer to whom the Minister may have delegated his powers to in that behalf. D

(5) (a) A conciliatory body to which a matrimonial difficulty has been referred shall resolve it within the period of six months from the date of reference; and shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it may think fit and may, if it considers it necessary, adjourn its proceedings from time to time. E

(b) If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume marriage life together, it shall issue a certificate to that effect and may append to its certificate such recommendations as it thinks fit regarding maintenance, division of matrimonial property and the custody of the minor children, it any, of the marriage. F

(c) No advocate or solicitor shall appear or act as such for any party in any proceeding before a conciliatory body and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body. G

Case for the respondent

Ms Evelyn Khoo for the respondent rested her case solely on the admitted non-compliance of s 106 of the Act. Since it was expressly pleaded that reconciliation was unsuccessfully attempted by the relatives of the petitioner and not a conciliatory body as defined by s 106(3) of the Act, she asked for the petition to be struck out. H

Case for the petitioner

I

Ms Theresa George for the petitioner in tracing back the historical reason for the implementation of s 106 submitted that it was done for the support of the union of marriage, the protection of children, the removal of hardship and for the reduction of illicit unions.

A Arguing that she was relying solely on proviso (vi) to s 106(1), she submitted that since both parties had lived apart for well over 20 years, this itself was clearly an exceptional circumstance within the meaning of proviso (vi). There has been no communication between the parties for these years and therefore no purpose was to be served by merely having a B rubber stamp from the reconciliatory body that it was unable to resolve the matrimonial difficulties and to persuade the parties to resume co-habitation.

With regard to the meaning of the word 'impracticable' as stated in proviso (vi), she argued that this meant that the continued union of the marriage was no longer feasible.

C

Findings of the court

It is rather surprising that after 22 years of incorporating s 106 into the Act, there has been no reported case on this.

D *Reason for the introduction of s 106*

The Royal Commission

A Royal Commission was set up before the amendment of the Act to look E into various issues relating to the marriage and divorce laws of non-Muslims. Its report called 'Report of the Royal Commission on Non-Muslim Marriages and Divorce Laws' was dated 15 November 1971 ('the Report'). I shall confine my review of the Report to issues related to s 106 of the Act. Whilst recommending that marriages ought to be dissolved F under circumstances which make it 'just and reasonable' and that enquiries should be made by the court into facts to satisfy itself that the marriage had indeed irretrievably broken down, the Report also recommended:

> ... that attempts at reconciliation be made before the filing of any petition for divorce and that proceedings in court may be adjourned at any stage and for such period as the court thinks fit, to encourage reconciliation ... .

G

In relation to the reconciliation aspect of its report, the Commission was of the view that since in Christian churches and communal bodies among Chinese and Hindus there are respected elders whose words are listened to with respect, their services together with that of Justices of Peace may be H utilized for the setting up of conciliation councils.

The Denning Report

With a view to promoting reconciliation for saving marriages and being part of a rhetoric of divorce reform, the United Kingdom Government I established a committee headed by Denning J (as he then was). The Denning Report (as it was called) recommended that 'reconciliation should be attempted in every case where there is a prospect of success' (see Cmd 7024, para 3).

Reconciliation

In *Bowman v Bowman* [1949] 2 All ER 127 (CA), a wife sought leave to present a petition for divorce although three years had not passed, on the ground of exceptional hardship suffered by her or exceptional depravity on the part of the husband. The court held that the really important consideration was to see whether there was any chance of a reconciliation. On this point, it held that it was material for the court to enquire what the applicant had already done to try to make the marriage a success or to become reconciled. It went on to hold that if the court was not satisfied that all which is reasonable has been done in that respect, it might well dismiss the application.

Pre-requisite

It is clear that pursuant to s 106(1) of the Act, obtaining a certificate from the conciliatory body that it has failed to reconcile the parties is a pre-requisite, subject to the provisos. It would seem that whilst provisos (i)–(v) to s 106 suggest that the mere averment of such facts in the petition would suffice, proviso (vi) suggests that the court must be satisfied of the existence of the exceptional circumstances. This leads to the suggestion that evidence must be led for the court to make that decision. Does this mean that if a petitioner intends to rely on proviso (vi) to s 106, the petitioner must first file an originating summons stating facts which the court ought to rely on, and upon being so satisfied, to give leave to the petitioner to then file a petition. I do not think so. It is not the intention of Parliament to cause hardship to litigants and more so in divorce matters where it might become necessary for parties to put an end to their marriage as soon as possible, so as to start their lives afresh. It is my judgment that if a petition is filed and it becomes necessary for the petitioner to comply with proviso (vi) to s 106, so long as a preliminary objection is taken by the respondent, it is sufficient for the petitioner to either give oral or affidavit evidence to satisfy the court that there are exceptional circumstances.

Intention of s 106

It is obvious that the purpose and intent of s 106 is to reconcile parties where there is a reasonable probability of a reconciliation. In fact s 106(5)(b) of the Act provides that together with the certificate it issues, the conciliatory body can make recommendations regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage. In other words, it is apparent that the elders of the religion, community, clan or association (see s 106(3)(a) of the Act) who might be even familiar with the parties and their situation in life could therefore make recommendation for the preservation of the property and the welfare of the minor children. I have also to consider if there is any wilful refusal to refer to a conciliatory body. I have also to consider whether the parties are young and whether it is appropriate to write off their prospects of reconciliation as hopeless and whether the guidance of the conciliatory body which oft times has proven valuable in promoting a stable and satisfactory reconciliation, would prove beneficial to this case.

Section 55 of the Act

The said section reads:

> Provisions designed to encourage reconciliation
>
> (1) Provision may be made by rules of court for requiring that before the presentation of a petition for divorce the petitioner shall have recourse to the assistance and advice of such persons or bodies as may be available for the purpose of effecting a reconciliation between parties to a marriage who have become estranged.
>
> (2) If at any stage of proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation. The power conferred by the foregoing provision is additional to any other power of the court to adjourn proceedings.

It seems to me that pursuant to this section recourse can be made to the rules of the court for a petitioner, before presenting a petition, to rely on such rules to show that the petitioner has sought *the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation.* Whilst this section refers to the availability of persons or bodies, s 106 relies only on the requirement of the need to refer to a reconciliatory body.

It is my judgment that pursuant to proviso (vi) of the Act, it is open to the petitioner to 'satisfy the Court' that the rules allow him to rely on the fact that he had sought the assistance and advice of persons, namely his relatives. It is my judgment that this is a truly appropriate case to invoke the applicability of O 92 r 4 of the Rules of the High Court 1980 ('the Rules') which reads:

> Inherent powers of the Court
>
> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

I therefore hold that to prevent injustice it is appropriate for this court to hold that attempts by 'saudara mara' (relatives) to reconcile the parties ought to be accepted and read together with s 55 and proviso (vi) to s 106 of the Act.

Exceptional circumstance

I hold that the very fact that both parties had lived apart with no contact with one another for well over 20 years is prima facie evidence that each of them is entitled to a dissolution of the marriage which to my mind has been a marriage in name only and not in substance, in law only yet not in fact. I further hold that it is not conducive to public interest that a man and a woman should remain bonded in matrimonial permanence, when the duties and responsibilities of such a hallowed institution have long ceased to be observed by either party. Any further continuance of this union might possibly lead to immorality and infidelity.

Further, there is no cause for concern in so far as the children are concerned. They are both 29 and 25 years old respectively. There is also no prayer for maintenance. It is a case of prayer for dissolution simpliciter.

Again this is not a case where no attempts have been made at reconciliation. In the absence of any denial on the part of the respondent it must be taken that the relatives of the petitioner did attempt a reconciliation. In this case, in any event, I am satisfied that there is certainly no reasonable possibility of a reconciliation. Their living apart for 20 years without any contact with one another clearly indicates the impracticability of both parties getting back together. I therefore hold that the very fact that the marriage has broken down by the fact of over 20 years of separation, and that neither party had shown any desire towards the continuance of the union and that there are no infant children involved to motivate a desire for the continuance of the marriage, that a consideration of all these factors clearly show exceptional circumstances, falling within proviso (vi) to s 106 of the Act.

Impracticable

Proviso (vi) to s 106 clearly enunciates that I must be satisfied that having found that there are special circumstances, I must also find that such special circumstances make reference to a conciliatory body impracticable.

The object of construing an Act is to ascertain the intention of Parliament. The common sense meaning of 'impracticable' to my mind is that a thing can only be done at an excessive or unreasonable cost. But how would the question of excessive costs apply to the use of the word 'impracticable' in the context in which it is used in proviso (vi) to s 106 of the Act? The conciliatory body is clearly defined in s 106(3). It is just a matter of writing to the body to fix appointments. The question of costs or that it is excessive is not an issue. Therefore, it is clear that the word impracticable means impractical. *The Concise Oxford Dictionary* (9th Ed) defines 'impractical' as 'not practicable'. Impractical would therefore present a meaning connoting fruitlessness, a sense of futility and performing an act in vain or where it is not practical or workable to perform such an act. This is just precisely what the petitioner would be doing in this case if he were to refer to the conciliatory body. To my mind such a referral would be an exercise in futility performed solely for the purpose of obtaining a rubber stamp to a certificate showing the failure of the body to effect a reconciliation.

I am therefore satisfied that having considered all the facts relevant to the consideration of the preliminary objection, such an objection must indeed fail. It is therefore dismissed with costs.

Preliminary objection dismissed.

Reported by Jafisah Jaafar